

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

MARGARET DOWNING,
Plaintiff,
vs.

No. **C00-4162-MWB**

LARRY G. MASSANARI, Acting Commissioner of Social Security, [\(1\)](#)
Defendant.

**REPORT AND
RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Margaret Downing ("Downing") appeals the decision by an administrative law judge ("ALJ") denying her Title II disability insurance ("DI") benefits and Title XVI supplemental security income ("SSI") benefits. The ALJ's decision was rendered after an earlier decision by the Commissioner was reversed and remanded by this court. *See Downing v. Apfel*, Civ. No. 98-4053 MWB ("*Downing I*"⁽²⁾). In support of her appeal, Downing argues (1) the ALJ's decision is not supported by substantial evidence in the record as a whole, and (2) a review of the record demonstrates the Commissioner has not met his burden of proving that during the relevant period, Downing had the functional capacity to work despite her impairments and limitations. Doc. No. 11, at 1.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On January 26, 1996, Downing filed an application for DI benefits and an application for SSI benefits, alleging a disability onset date of June 5, 1995. On April 3, 1997, after a hearing, an ALJ ruled Downing was not entitled to either DI or SSI benefits. Downing reapplied for benefits on April 16, 1997, and was awarded benefits at the agency reconsideration level commencing April 4, 1997.

On May 22, 1998, Downing filed a complaint in this court seeking judicial review of the Commissioner's ruling on her first application for benefits. Because Downing had already been awarded benefits commencing April 4, 1997, the case concerned only the period from June 5, 1995, the alleged disability onset date, to April 3, 1997 (referred to in this opinion as the "closed period"). On September 23, 1999, the Commissioner's decision was reversed by this court, and the case was remanded to the Commissioner for a rehearing to further develop the record concerning the severity of Downing's psychological condition during the closed period, and its effect on her ability to work during that period. *Downing I* at 18-19.

The rehearing was held before ALJ Cheryl Rini in Sioux City, Iowa, on April 11, 2000. R. 367-431. Downing was represented at the hearing by non-attorney Lee Sturgeon. Downing and Vocational Expert ("VE") Sandra Trudeau testified at the hearing. On July 28, 2000, the ALJ ruled Downing was not disabled at any time during the closed period. R. 331-50.

On November 27, 2000, Downing filed a timely complaint seeking judicial review of the ALJ's ruling after the remand. Doc. No. 1. Downing filed her brief on May 4, 2001, Doc. No. 11, and the Commissioner filed his brief on July 2, 2001, Doc. No. 12. The court now deems the matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of the ALJ's decision.

B. Factual Background1. Introductory facts

The factual record developed at the first ALJ hearing is summarized in *Downing I*, pages 3-6, and will not be repeated at length here. In summary, Downing was working as a nursing assistant on March 8, 1995, when she injured her neck while lifting a patient out of a wheelchair. This injury eventually led to a discectomy, which was performed on July 17, 1995. Downing was released to light duty activity by her doctor on September 5, 1995. Although her surgeon felt the surgery was a success, Downing continued

to have multiple complaints. On February 8, 1996, her surgeon stated Downing could work full time for eight hours per day.

On October 17, 1997, Downing was admitted to the intensive care unit of St. Luke's Regional Medical Center in Sioux City, Iowa, after a suicide attempt. R. 229. Downing told doctors she felt overwhelmed after being denied Social Security and disability benefits, and had ingested insecticide in an attempt to end her life. R. 227-29.

According to Downing's testimony at the first ALJ hearing, she suffered from depression beginning about two weeks after the surgery on July 17, 1995. R. 49-50. She told the ALJ, "I don't sleep well. I don't eat right, I'm nervous all the time, I cry a lot, I get angry. A lot of times I just don't care whether the day is here or not." R. 49. She testified she was continuing to lose weight, and she had recently "lost another four pounds."⁽³⁾ *Id.* When the ALJ asked her why she felt she could not work, she responded:

I don't have the physical ability to really take care of myself and my home. It takes everything I have just to try to take care of me. I don't have the physical ability anymore to do anything.

R. 54.

The ALJ then asked Downing if there was anything about her being depressed that kept her from working, and she responded as follows:

I get upset a lot. A lot, a lot of times I get angry if something doesn't go right, something as simple as cracking an egg in a, in a skillet and breaking it. It makes me angry, it makes me - that I can't, that I can't do - like, picking it up and flipping it a lot of times, I get it into the spatula, I think great, then all of sudden I drop it and it's break all the pieces again. Confused. A lot. I don't feel like I've got control over my own life anymore. I feel when I got hurt something was taken away from me.

Id.

At the second ALJ hearing, after remand, Downing testified further concerning her claim. She denied frequent drug or alcohol abuse during the closed period, but admitted she smoked a pack of cigarettes a day. R. 380-83, 419. She was not taking medication for any mental or emotional problems during that period. R. 383. However, she recalled that she would cry often, had a short attention span, and would become confused while reading. R. 416-17.

In response to questions by the ALJ, Downing testified as follows:

Q. [D]uring this period, which is June of '95 to April of '97, can you tell me how you felt your depression affected your ability to work?

A. After a few, few visits with Dr. [Reeder] it, it was like things weren't snapping back the way I thought they would. I realized that there would be discomfort. I didn't realize the, the severity of what the

discomfort would consist of. It's -

Q. Were you having frequent crying spells during that period do you think?

A. I mean I'd be doing something or sitting and out of the blue I would start crying. It got - there was a certain point there to where I didn't even want my kids there.

Q. Why not?

A. What I really wanted - I just wanted to be left alone.

Q. Okay.

A. I felt like I needed to hide.

Q. Any why is that?

A. It, it seemed like that I had been - I don't know - a Mom [who] had been able to do everything. I would - I could solve things. I could work. I could come home and cook. I could clean the house. After, after the injury in, in - instead I'd become somebody that was dependent. I - there was things I couldn't do for myself. I had to ask [for] help. I mean, I - grant - that - you know, they helped me, they didn't complain, but to me it was kind of degrading.

R. 407-08.

Downing testified she attempted to commit suicide in October 1997, by taking insecticide, and two or three months earlier she had attempted to commit suicide by taking antifreeze. R. 410-11. At the time of the second ALJ hearing, Downing testified she was taking Paxil for depression, and was seeing a counselor and a therapist. R. 415-16. She testified that at the time of the hearing, her condition had improved from what it had been during the closed period. R. 418.

2. Plaintiff's medical history

Downing's medical history was recited in detail in *Downing I*, at pages 7-11, and will not be repeated here. Significantly, as discussed below, no additional medical records or evidence were offered at the second ALJ hearing.

3. Vocational expert's testimony

VE Sandra Trudeau testified at the April 11, 2000, hearing. *See* R. 422-30. The ALJ asked the VE the following question:

Q Hypothetical number one. I want you to assume an individual with the same vocational profile as the claimant, but for the moment disregard her testimony. Assume an individual who could lift or carry 20 pounds occasionally, 10 pounds frequently. Can stand or walk at least six hours in an eight-hour day with normal breaks, meaning about every two hours. And can sit for at least six hours in an eight-hour day with normal breaks, meaning about every two hours. This individual has no push or pull limitations, but cannot climb any ladders, ropes, or scaffolds and can perform all other postural maneuvers only on an occasional basis. This individual has no manipulative, visual, communicative or environmental limitations. Could that individual return to any of the past work of the claimant or perform any other work in the national economy?

R. 423-24. The VE testified the hypothetical claimant could not perform any of Downing's past jobs, but could perform a number of other unskilled sedentary and light jobs. R. 424.

The ALJ then asked a second hypothetical:

Q. Hypothetical number two. Again, assume an individual with the same vocational profile as the claimant, but for the moment to disregard her testimony. Hypothetical number two is the same as hypothetical number one, but I want you to further assume that this individual cannot drive for work purposes. Cannot perform overhead reaching or overhead work with either arm. Cannot use hand controls that require gripping or pushing or pulling in excess of 20 pounds. And this individual cannot work at unprotected heights. There are no other changes to hypothetical number one. Could that individual return to the past work of the claimant or perform any other work in the national economy?

R. 424-25. The VE responded the hypothetical claimant could perform the same jobs as in the first hypothetical situation. R. 425.

The ALJ's third hypothetical question was as follows:

Q. Hypothetical number three. Again, assume an individual with the same vocational profile as the claimant, but for the moment disregard her testimony. Hypothetical number three includes everything in hypothetical number two and one. But I want you to further assume that this individual is only able to

understand, remember and carry out simple instructions and one- to two-step procedures. She can respond appropriately to supervisors and co-workers and usual work situations. She can deal with changes in a routine work setting and she can exercise judgment. No other changes to hypothetical number two. Could that individual return to any of the past work that the claimant has performed or any other work in the national economy?

R. 425-26. The VE again responded the hypothetical claimant could perform the same jobs as in the first hypothetical situation. R. 426.

The ALJ then asked her fourth hypothetical question:

Q. Hypothetical number four. Again, assume an individual with the same vocational profile as the claimant, but for the moment to disregard her testimony. Hypothetical number four is the same as hypothetical number three, but I want you to assume that I further find that this individual can use the dominant right hand for only up to 200 repetitions per day grasping. And that would be materials handling. No other changes to hypothetical number three. Since you've already said she can't go back to past relevant work, is there any other work that this individual can perform?

Id. The VE responded this hypothetical claimant would be able to perform a number of sedentary and light jobs. *Id.*

As a fifth hypothetical, the ALJ asked whether, if the ALJ found Downing's testimony to be entirely credible, Downing would be able to perform any work in the national economy. R. 427. The VE responded in the negative, stating:

I base this on her testimony that she had great difficulty in using her right hands [sic]. She could make a fist, but could not use her fingers. Also that she was experiencing dizzy spells and blurred vision. She would have some good days, but as the days went on her symptoms would increase and the pain would increase up to a ten-plus. She had frequent crying spells. Wanted to be isolated. Sleep was irregular. She indicated that her mental state -- she was confused, unable to concentrate, her attention span was short. And had difficulty completing tasks. And I -- all those things would prevent her from being employable.

R. 427-28.

4. The ALJ's conclusion

To begin the five-step sequential evaluation process, the ALJ found Downing had not engaged in any substantial gainful activity at any time since June 5, 1995. R. 336 She then turned to the question of whether Downing had a medically determinable, severe impairment or combination of impairments that met the regulatory criteria. In considering Downing's alleged mental impairment during the closed period, the ALJ noted Downing "had a hard time recalling [the closed period]," and there was "nothing

in the evidence of record to substantiate the claimant's allegations of disabling depressive symptoms." R. 341. The ALJ observed that when Downing was hospitalized after her October 1997, suicide attempt, she stated she was depressed about the denial of Social Security benefits.⁽⁴⁾ *Id.* According to the ALJ, Downing "was exhibiting manipulative behavior and was just frustrated with not being awarded benefits." *Id.* The ALJ also noted that during the closed period, Downing was not on any medication for depression. R. 342.

A review of the record indicates Downing offered no new evidence beyond her own statements that she had sought treatment for depression during the closed period. Although social worker James Anderson recommended that Downing seek mental health care, *see* R. 202, nothing in the record indicates she ever did so. On September 4, 1996, Rehabilitation Consultant Patricia Conway noted Downing told her she was "going to be seeing a physician on September 6, 1996 for her symptoms of depression." R. 494. No records of that visit, if it occurred, were provided to the ALJ. Nevertheless, as the Commissioner notes in his brief, *see* Doc. No. 12 at 4, the ALJ gave Downing the benefit of the doubt and found she had a severe mental impairment beginning September 6, 1996. *See* R. 337, 345.

Finding Downing's impairment did not meet or equal the criteria of a listed impairment, R. 337, the ALJ then turned to consideration of whether, during the closed period, Downing retained the residual functional capacity to work during the closed period. *See* R. 339-44. She concluded as follows:

The undersigned finds that during the closed period, the claimant retained the residual functional capacity to lift and carry up to 20 pounds occasionally and 10 pounds frequently, stand and/or walk for about 6 hours of an 8 hour workday with normal breaks (about every 2 hours), and sit for at least 6 hours of an 8 hour workday with normal breaks. She was precluded from climbing ladders, scaffolding, and ropes, but otherwise could perform all other postural maneuvers only on an occasional basis; could not perform overhead reaching or overhead work with either arm; could not use hand controls which require gripping or pushing or pulling in excess of 20 pounds; could only use right dominant hand for up to 200 repetitions per day in grasping in materials handling; could not work at unprotected heights; and could not drive for work purposes.

From June 5, 1995 until September 6, 1996, the claimant had no medically determinable mental impairment and thus no functional limitations as a result of any mental impairment. Beginning September 6, 1996, the claimant was only able to understand, remember, and carry out simple instructions and one-to-two step procedures; respond appropriately to supervisors and co-workers and usual work situations; deal with changes in a routine work setting; and exercise judgment.

R. 342-43.

The ALJ found that although Downing was unable to return her past relevant work, she retained, during the closed period, "the capacity to make an adjustment to work which exists in significant numbers in the national economy." R. 344. The ALJ therefore concluded Downing was not disabled under the Social Security Act during the closed period, and was ineligible for SSI and DI benefits for that period. R. 344-46.

III. ANALYSIS

In *Downing I*, the court ruled the ALJ's initial decision denying benefits to Downing was based on substantial evidence, but the ALJ had not had the opportunity to consider evidence of a possible psychological impairment that might have limited Downing's ability to work during the closed period because that evidence only came to light after the first ALJ hearing had been concluded. The court remanded the case for consideration of such evidence.

Upon remand, a different ALJ considered the evidence in light of the entire record, including the additional evidence submitted at the second ALJ hearing, and found Downing was not disabled during the closed period. The court now must determine "whether the Commissioner's findings are supported by substantial evidence on the record as a whole." *Hutsell v. Massanari*, ___ F.3d ___, 2001 WL 863620, slip op. at 6 (8th Cir. Aug. 1, 2001) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)). The *Hutsell* court explained:

Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion. *Id.* In determining whether existing evidence is substantial, we consider evidence that detracts from the Commissioner's decision as well as evidence that supports it. *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000). As long as there is substantial evidence on the record as a whole to support the Commissioner's decision, we may not reverse it because substantial evidence exists in the record that would have supported a contrary outcome, *id.*, or because we would have decided the case differently, *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992).

Id.

The *Hutsell* court explained that "a claimant's residual functional capacity is a medical question." *Hutsell*, slip op. at 6 (citing *Lauer v. Apfel*, 245 F.3d 700, 704 (8th Cir. 2001)). Further, "[t]o properly determine a claimant's residual functional capacity, an ALJ is . . . 'required to consider at least some supporting evidence from a [medical] professional.'" *Id.*, slip op. at 7 (citing *Lauer, id.*). However, although an ALJ has a duty to "obtain medical evidence that addresses the claimant's ability to function in the workplace," *id.*, Downing's case deals with a closed period that ended three years prior to the second ALJ hearing. Thus, it is unreasonable to expect the ALJ to obtain a mental evaluation of Downing's condition during the closed period consisting of anything beyond a review of existing records - of which there are none.

Similarly, Downing could have produced medical evidence of her treatment for depression subsequent to the closed period that would have bolstered her claim that she was disabled due to her psychological condition during the closed period. *Cf., e.g., Basinger v. Heckler*, 725 F.2d 1166, 1169 (8th Cir. 1984) ("[M]edical evidence of a claimant's condition subsequent to the expiration of the claimant's insured status is relevant evidence because it may bear upon the severity of the claimant's condition before the expiration of his or her insured status." (Citations omitted.)) Downing failed to do so.⁽⁵⁾ The ALJ noted Downing failed to produce records from an alleged hospitalization at Cherokee Mental Health Institute in 1989 or 1990. She also pointed to several inconsistencies between Downing's testimony in the two hearings and Downing's statements to physicians and others, ultimately concluding Downing's subjective complaints were not credible. *See* R. 336, 341.

The court finds Downing has failed to meet her burden to provide objective medical evidence that she was disabled due to a psychological condition during the closed period. The court finds substantial evidence in the record as a whole supports the ALJ's finding that Downing was not mentally disabled during the period relevant to this appeal. Accordingly, the ALJ's decision should be affirmed.

IV. CONCLUSION

IT IS RECOMMENDED, unless any party files objections⁽⁶⁾ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that judgment be entered in favor of the Commissioner and against Downing.

IT IS SO ORDERED.

DATED this 23rd day of August, 2001.

PAUL A. ZOSS

MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

1. This case was filed originally against Kenneth S. Apfel, who was at that time Commissioner of the Social Security Administration. On March 29, 2001, Larry G. Massanari became Acting Commissioner of the Administration, and he is therefore substituted as the defendant in this action. *See* Fed. R. Civ. P. 25(d)(1); *cf.* Fed. R. App. P. 43(c)(2).
2. Citations to *Downing I* are to the Report and Recommendation filed September 3, 1999, as Docket Number 23, in case No. C98-4053-MWB.
3. At the time of the first ALJ hearing, Downing was five foot two or three inches tall, and she weighed 95 pounds.
4. The ALJ's decision to deny benefits occurred on April 3, 1997, the last day of the closed period.
5. Downing claims otherwise. *See* Doc. No. 11 at 8-9. For example, she points to the examination notes of Rodney Dean, M.D., the psychiatrist who examined Downing after her October 1997 suicide attempt. In her brief, Downing claims Dr. Dean made a "finding" that Downing had "chronic feelings of helplessness, hopelessness and despair. Low self esteem and dysphagia [sic] over the last 2+ years. . . ." Doc. No. 11 at 9, quoting from R. at 231. A review of Dr. Dean's notes indicates these statements are taken out of context. Dr. Dean was reporting only what Downing had told him, not making specific findings. He diagnosed Downing with major depressive disorder without psychosis, but noted she was cheerful and cooperative during the interview. He also noted she had been drinking and had taken "a line

of amphetamines" prior to ingesting the insecticide. R. 229, 231. The ALJ concluded Downing's suicide attempt evidenced "manipulative behavior arising from her frustration at being denied Social Security benefits." The ALJ noted Downing claimed to have attempted suicide on previous occasions, but Downing had not told anyone about them, including her husband, nor had she sought treatment. R. 341-42.

6. Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).